Item 5 99-33 Amend 6.610 and 7.103

JUDGE SMOLENSKI: Thank you, Chief Justice and Justices of the Supreme Court. I believe this is Dave Palazzolo and you need a bigger sign Dave. Because the three-minute time period, I think my watch is broken but I admire your patience because this has been long. I'm here to just briefly discuss 6.610 and 7.103 as asked as part of the presidency of the Michigan District Judges Association. We are in favor of the changes that are set forth in the proposals. I might add that I'm down for agenda items 5, 8, 11 and 12. Many of them are repetitive so I'm going to keep my 3 minutes on all of them. We think that the 6.610 provisions challenging the plea are fine. It appears to be in the interest of fairness. We don't have any problems with it. We would like to do whatever is necessary to facilitate the efficient administration of justice. When you're talking about 7.103, placing a time limit on the delay to applications for the leave to appeal, we think that makes sense. It's good. We need to have a time limit on it. We also would echo that which was set forth from the letter in the appellate practice section that talked about there might be some need to change some other provisions to make sure that it's not an unending, unlimited time period there. The way that 6.610 pans out in the proposed changes. As far as discovery in misdemeanor cases, we don't have any problems with that either. We don't think anything should cause an unreasonable delay because in district court of course it's a very intense docket, very high volume. But we don't see any reasons that the rules in the district court can't apply the same as they do in the circuit court as it relates to that. I skipped ahead just a little bit there because I'm not able to stay and continue with the other three agenda items that I'm identified under.

JUSTICE YOUNG: Trying to escape?

JUDGE SMOLENSKI: Yes, exactly, Justice Young.

JUSTICE WEAVER: Well, do you want to make all your comments?

JUSTICE CORRIGAN: Can I ask Judge Smolenski one question? Some of the trial judges at the circuit level feel that that motion for relief from judgment procedure is very burdensome. You're saying,by what you're saying today that the district judges don't mind moving to that motion for relief from judgment procedure—

JUDGE SMOLENSKI: I can tell you this, Justice Corrigan, that the district judges have not taken an official position. We have had the opportunity, and I think as Judge Clulo said with Canon 7 and 8 and it sounds perhaps, from my perspective, as a cop-out, but we have not had our board meeting to make the final decision as a board decision. We're giving you a generic view right now from our rules committee but it has not gone through our formal board.

JUSTICE CORRIGAN: Right, because they ought to understand what it is that they're signing up for here. I basically agree that time limits are appropriate but I--

JUDGE SMOLENSKI: Are you speaking specifically 7.103(6).

JUSTICE CORRIGAN: I'm not even sure, I'd have to pull the language, but it's the part of the proposal that now lets--

JUSTICE YOUNG: Is that the subchapter 6.5

JUSTICE CORRIGAN: It's the 6.500 chapter. It's 6.610(E)(7)(a) adds 6.500 subchapter provisions now for misdemeanor guilty pleas.

JUDGE SMOLENSKI: Right and then what I was saying as far as the appellate practice section, they outline in their letter that went to the Supreme Court how that could complicate matters if you don't change some of those older rules, it might make it not feasible.

JUSTICE YOUNG: Judge Smolenski, what you're saying to us is that your association really has not had time

JUDGE SMOLENSKI: To be forthright, yes, but I've heard others say that too and it sounds kind of like a cop-out, and realistically, our board meets this afternoon, we're going to be dealing with some--the chair of our rules committee that deals with these specific rules had a very serious tragedy in his family so--

JUSTICE YOUNG: Let me suggest this. I would be very reluctant to put into place a rule that may substantially complicate a district judge's life without having an informed judgment and position of the District Judges Association. Again, let me simply say to you, we don't publish these rules for the exercise. We really are trying to get informed public feedback and your organization is certainly one of those that I would look to for their expertise in managing the procedural burden that this rule might impose so--

JUSTICE CORRIGAN: It isn't to say that there shouldn't be time limits.

JUDGE SMOLENSKI: Right.

JUSTICE CORRIGAN: But the question is--

JUDGE SMOLENSKI: Is this the way to do it. And I appreciate that.

And I appreciate, Justice Young, your offer to give us more time and I didn't know what the time deadline was but we can study, I was very interested to see how the appellate section addressed it because that brought it to light that there would have to be some additional changes under 6.500 because of the fact that you can't have one with the other.

JUSTICE YOUNG: Can you tell us what kind of reasonable extra time your association would need. Again, this isn't just an exercise of reading the rules--

JUDGE SMOLENSKI: I would say within 60-90 days we should be able to have a decision on that specifically. I don't really need to address any of the other issues. I think they are similar in nature as we said, but I do very much appreciate being listed on the agenda and I'm not able to say for the remainder. Any other questions? Thank you very much everybody.

JUSTICE WEAVER: I have here listed Oakland County Prosecutor/PAAM. Is there someone representing them? Can you identify yourself.

MS. DAY: My name is Marilyn Day and I'm an assistant prosecuting attorney in Oakland County and I'm also representing the Prosecuting Attorneys Association of Michigan on this particular case. This is still on item 5 and item 5 deals with the proposed amendments to the court rules setting a time limit. The proposed amendments were filed in response to this Court's opinion in People v Michael Ward which is a case out of Oakland County dealing with drunk driving and collateral attacks on prior convictions. We would suggest two amendments to these proposed court rules. The first is, you have a one-year time limit. We would support a 6-month time limit because we see no reason why the time limit should be the same in misdemeanors as it is in felonies. For felonies you do in fact have one year to file motions to withdraw the pleas and for delayed applications, but there is no reason to treat felonies and misdemeanors the same because of the ramifications of the two. And in fact under the court rules for claims of right, felony defendants get 42 days to file a claim of right to the Court of Appeals but misdemeanor defendants for claim of appeals only get 21 days. More importantly, as Justice Corrigan mentioned previously, we do not believe that 6.500 is appropriate for misdemeanors. We don't think it is needed. We think the 6-month time limit is sufficient. There are basically three different reasons why we don't want 6.500. The first is we believe it undercuts the ruling in People v Michael Ward. In the Michael Ward case this Court indicated that when the motivation for filing a motion to withdraw the plea is based on sentencing considerations you can't do it. That's what you say in Michael Ward. Now you're proposing a court rule that says well yes you can do it, you can file 6.500. We also believe that there are some problems because for misdemeanor cases--

JUSTICE CORRIGAN: But it still is a collateral attack.

MS. DAY: It is a collateral attack and you have--

JUSTICE CORRIGAN: It's not a direct appeal, it's quite clear that it's a collateral attack.

MS. DAY: Correct, and you have other proceedings, I mean you have to find good cause and prejudice, but we don't see the need for that when you're talking about just a misdemeanor. And in (inaudible) in Oakland County the only reason these things are ever filed is because the defendants have picked up a subsequent charge and the prior misdemeanors are going to be used for sentencing enhancement. And for misdemeanors we perceive that most of the time when they're filing if they would file the 6.500 type motions they won't even currently be under sentence anymore. On the district court judges there's a one-year jail limit, two years in probation. We could foresee that the majorities of these motions the defendants aren't even on sentence and so what in effect they are trying to do is get an expungement of their conviction and we know that under the expungement statute you cannot get it expunged if you have a traffic offense which a lot of these drunk driving offenses are. And finally the practical effect, it undermines a concept of finality again and as indicated, we perceive that the only reason these types of actions will be filed is because of subsequent sentencing considerations and therefore it should be denied. Even if this Court disagrees with me and believes there needs to be some kind of 6.500, the 6.500 would have to be amended because under the 6.500 rules that are currently in existence, you get the right to get appointed counsel. Do you want to appoint counsel in these misdemeanor cases where they're not even serving sentence anymore or they never had jail time. It seems inconsistent. Also in the 6.500 rules it says you can file an appeal to the Court of Appeals. Obviously you wouldn't want misdemeanor defendants to be able to file an appeal in the Court of Appeals. We would ask that you shorten the time limit from one year to six months and would eliminate the 6.500 relief for misdemeanor defendants.

JUSTICE YOUNG: Did PAAM submit a letter?

MS. DAY: Actually it was mailed yesterday so you will be getting it within the next couple of days.

JUSTICE YOUNG: I think I just figured out--we're new at this kind of legislative role of opening ourselves to the public for comment and it strikes me that we may have at least a potential flaw--we have everybody's submissions but those submissions are not necessarily known to others who are participating and making comment. Judge Smolenski asked for more time for her organization to consider this. I would simply suggest that the comments that you've made here today may very well be relevant to what the District Judges Association would consider and I would encourage

you to share PAAM's concerns with the District Judges Association and therefore carbon Judge Smolenski.

MS. DAY: Definitely, Your Honor, and the appellate practice section, I had no idea what they filed and I found that interesting.

JUSTICE YOUNG: We may have to figure out a way so that there can be cross-pollination other than the seven members of the Court.

JUSTICE WEAVER: Any other questions of Ms. Day? Thank you Ms. Day. Any other comments for Item #5. Item #6. 98-51. I have Allan Falk. This is MCR 9.123.

Item 6 98-51 MCR 9.123

MR. FALK: I just want to make sure I'm addressing the right proposal. I didn't recognize the number that you read.

JUSTICE WEAVER: 98-51. MCR 9.123.

JUSTICE TAYLOR: This is the readmission of a lawyer who is suspended for the commission of a felony.

MR. FALK: I would note that this Court recently decided Attorney Grievance Administrator v Hibler and I think legally correctly and wisely said that lawyers who have been removed, had their licenses revoked are still subject to the attorney discipline process. In the latest issue of Lawyer's Weekly which I just got the other day, we had the example of a lawyer who has been disbarred caught practicing law and given an additional five-year suspension but the five-year suspension runs concurrently with the revocation. That makes no sense to me. That's essentially saying you're subject to discipline but there really is no discipline. So unless you have a process for keeping people out more than five years, they have no disincentive to not violate the prohibition. I think that's just very simple and if we're really interested in protecting the public from bad lawyers and by the time we revoke a license we've pretty much identified somebody who is way down the list, let them find another line of work. I don't think we need to worry about readmitting them. Since I still have some of my 3 minutes left I would simply like to mention since I'm in Grand Rapids that Saturday Joel Boyden, a former State Bar president and one of the deans of the Grand Rapids Bar died, I had the great privilege to work with him once. I also had the great privilege to oppose him when he was State Bar president but he proved to be quite a fine fellow and I think we had a great working relationship and I think it's a great loss to the Bar I would simply like to acknowledge here. Thank you.

JUSTICE WEAVER: Maureen Thomas.

MS. THOMAS: Good afternoon. I am the chair of the standing committee on grievance and I've been asked to speak today on behalf of the Board of Commissioners of the State Bar. We oppose this particular proposed amendment to the rules. We believe that mandatory minimum discipline is not appropriate because it eliminates the discretion that is currently afforded to the hearing panel, the discipline board and the attorney grievance administrator. I believe that you received from John Van Bolt some statistics that talk about our experience and I think those statistics are very helpful in evaluating this particular proposal because those statistics are in fact based on reality. If you look at those statistics you will see that unfortunately in the past 45 months we have had 28 disciplines that are the result of a felony conviction. However in 15 of those instances the discipline was revocation and this particular rule would not have impacted the discipline. In one or two of those cases the suspension was in fact in excess of six months beyond the sentence so again this particular proposal would have not impacted the discipline that was imposed. There are 11 or 12 cases however where this rule would in fact result in discipline that is greater than that which the hearing panel determined was appropriate, in some cases just by a few months but in some cases by several years. Some could argue, of course, that these statistics simply show that the discipline process is too lax and that we have a need for this rule. However, such an argument would in fact be based on generalizations and assumptions. We believe the generalizations and assumptions have absolutely no place in the discipline process. Every attorney, even an attorney who has been convicted of a felony is entitled to be heard before a hearing panel to present the facts and circumstances surrounding their felony conviction and facts and circumstances that impact their ability to practice law.

JUSTICE YOUNG: And what about this proposal precludes that?

MS. THOMAS: My understanding is they would not be entitled to petition for reinstatement until after, for example some of cases here we have a probation period. They would not be entitled to petition for reinstatement--

JUSTICE YOUNG: Your statement was that every attorney has a right to have their circumstances reviewed for readmission.

MS. THOMAS: Yes, and you are right. I didn't quite finish my thought there. My thought was you have the right to have your day before the hearing panel to present the facts and circumstances and to have the hearing panel, the discipline board and the grievance administrator have a decision made based on those facts and circumstances that you prevent.

JUSTICE YOUNG: Why do you have that right before the time has expired that you have served whatever penalty has been assessed.

MS. THOMAS: This is in the initial discipline process I'm talking about. What we believe is that this rule essentially takes away from the discipline process that ability by putting a mandatory minimum discipline procedure in there and puts in favor of the sentencing judge, I mean essentially the sentencing judge is the one who decides discipline because you pick up from where the sentence, the probation, the parole left off, you add six months and that is the first opportunity for you to petition for reinstatement.

JUSTICE YOUNG: This rule is limited only to felonies, correct.

MS. THOMAS: It is limited only to suspensions and felonies.

JUSTICE YOUNG: And what is the offense against nature about requiring somebody who has been convicted of a felony who has thereby abused the privilege of being a lawyer to serve the entire term of the penalty that is associated with the conviction.

MS. THOMAS: We have two different things. We have a criminal procedure and we have a discipline procedure. The point of the discipline procedure is not to punish people. It's to determine whether or not a person, you know, to protect the public, to protect the courts.

JUSTICE YOUNG: But wait a minute, the primary function of the criminal justice system is to protect the society and I guess I'm wondering why there would be a presumption that before someone had served the term of restitution to the society for the crime committed, that we would entertain a readmission to the privilege of practicing.

MS. THOMAS: That is a different way to look at it. I guess our position is that--

JUSTICE YOUNG: It is the way I'm looking at it so I'm asking you to tell me why that's wrong.

MS. THOMAS: I think that precludes the hearing panels from looking at individual cases individually.

JUSTICE YOUNG: I understand the point. My question is why is that a crime against nature.

MS. THOMAS: I'm not going to say a crime against nature.

JUSTICE YOUNG: Well, I'm being hyperbolic. If our goal here is to protect the public and it is in recognition that the practice of law is not a right but truly a privilege, and we're talking about people who have so contravened the norms of society that they have been convicted of a felony, why would we give the privilege of practicing law to such people before they have served their term in the criminal conviction.

MS. THOMAS: I think there is a distinction between the ability to continue to practice law and the punishment that should be metered in response to the particular felony.

JUSTICE YOUNG: And why do you make that distinction.

MS. THOMAS: I make that distinction because I think they are two different processes and I don't think we have any examples of the hearing panel coming up with a discipline ultimately that was inappropriate in light of a sentence that was issued in the criminal matter. In fact in most matters the discipline is in excess. I mean, as I indicated, in 15 or 16 of the 28 cases in fact the discipline was greater than the sentence, but there are some unique circumstances and this particular rule would preclude hearing panels from considering those unique circumstances.

JUSTICE YOUNG: Well, by extension your argument is that discipline being separate from criminal punishment, there conceivably therefore could be a circumstance in which the discipline would be appropriately shorter than the criminal period of incarceration because the discipline board determines that the punishment of incarceration is far longer than the discipline board would have given for merely the ethical violation.

MS. THOMAS: Practically speaking you are correct, but if you look at the statistics that has never happened.

JUSTICE TAYLOR: But why would you want to have a situation where that could happen?

MS. THOMAS: Well I think the Michigan Judges Association suggested that the rule be amended slightly only to deal with the incarceration issue and not to tack on the six months after the probation. I mean, they're two different issues.

JUSTICE CORRIGAN: Ms. Thomas, how long does it take for a reinstatement petition to wind its way through the system. Does it take a long time?

MS. THOMAS: Probably in the area of 4-6 months and there can be further delays beyond that.

JUSTICE CORRIGAN: So we're precluding filing under this rule until six months after they're all done in the system, period, plus until you're done. So we're putting them out of business theoretically maybe for a whole year.

MS. THOMAS: Perhaps.

JUSTICE WEAVER: Anything further?

JUSTICE YOUNG: Let me just ask, what does rehabilitation mean to--you're representing the ADB.

MS. THOMAS: I am representing the State Bar Board of Commissioners, so I'm not on a hearing panel, I'm not on the discipline board and I can't answer that question for you.

JUSTICE YOUNG: Well, what is the Bar's position? Does rehabilitation include service of one's obligation stemming from a conviction?

MS. THOMAS: I do not believe that the State Bar's position in light of the position they're taking on this rule is that in all cases completion of the criminal sentence and parole is required to demonstrate rehabilitation.

JUSTICE YOUNG: Suppose I stole from my client and not only lost my license but was criminally convicted and part of my responsibility is restitution, all right, under the criminal sanction. Is there any circumstances under which the Bar would entertain a notion of reinstating a person into the Bar that hadn't fulfilled that restitutionary purpose?

JUSTICE TAYLOR: I believe that happened, didn't it, just recently?

MS. THOMAS: I'm not aware of that, no.

JUSTICE YOUNG: It did. Do you think that's a good idea?

MS. THOMAS: Personally I don't think it's a good idea, no.

JUSTICE WEAVER: What is your experience in this area?

MS. THOMAS: I am presently the chair of the standing committee on grievance. I have been practicing law for 16 years. I am not on a hearing panel. I am not in any way related to anybody on the grievance commission. I am not on a hearing panel, no. There is a group of attorneys that are members of the State Bar. There is a wide variety of attorneys on the committee. Some of them are very much involved in the process. They represent attorneys before the hearing panel. We have expertise from John Van Bolt and from Allen Sobel and from Bob Edict on our committee. And then others are simply attorneys who are practicing law who are impacted by the various 900 rules and the Rules of Professional Conduct.

JUSTICE WEAVER: Thank you very much. Cynthia Bullington.

MS. BULLINGTON: Good afternoon Justice Weaver and Members of the Court. I am here on behalf of the Attorney Grievance Commission. I have had the pleasure of working for that body since 1982, first as a law clerk, then as a lawyer, now as an assistant deputy. I have had much experience in handling disciplinary cases including reinstatement matters. The Commission fully supports the proposed rule amendment as do I myself. I believe it fulfills a need both in terms of ensuring that lawyers' images as perceived by the public is a good one. It also lends certainty to hearing panels in the imposition of appropriate discipline. This Court, I believe, has over the years been coming to the culmination of this proposal. The first time this Court had addressed a matter similar to this was In the Matter of Albert Hatcher, which is found at 440 Mich 1210 (1992). In that matter the Court held that an attorney was ineligible to file a petition for reinstatement while imprisoned in a federal correctional facility. Subsequent to that, and the primary case in this area is the Matter of the Reinstatement of Robert McQuarter, which is found at 449 Mich 130 (1995). As this Court is aware, the Court held that the passage of time by itself is not sufficient to support reinstatement and where, and this was a disbarred attorney. The Court has held that a person seeking reinstatement must have spent sufficient time outside the supervision of parole authorities to clearly and convincingly establish that he has satisfied the requirements of MCR 9.123(6) and (7). That decision of the Court was subsequently narrowed by the Attorney Discipline Board in the case of In the Matter of the Reinstatement of N.C. Deeday-Lorraine, ADB Case No. 96-286-RP. It's a February 12, 1998 decision of the board. In that case the board held that the McBorder case was inapplicable to attorneys who are suspended from the practice of law.

JUSTICE YOUNG: It wasn't limited, it was distinguished, right? The ADB doesn't have the power to--

MS. BULLINGTON: It distinguished it, yes sir, thank you. And essentially this proposed court rule is in line with the position taken by the commission in that N.C. Deeday-Lorraine case and we believe that for the reasons that we argued in that

matter it is appropriate.

JUSTICE CORRIGAN: Ms. Bullington, can you address yourself to the Judges Association proposal. They're saying we should distinguish between incarceration and probation and parole. How does the Commission feel about that?

MS. BULLINGTON: Well the Court I think drafted the rule very ably, limited to felony convictions and it's limited to those situations where an attorney has to seek reinstatement proceedings. That doesn't kick in until 180 days have passed.

JUSTICE CORRIGAN: After, but they make the point that some people might be on probation for five years so you put them out of commission for that entire time plus.

MS. BULLINGTON: That rule would, but the point is that the attorney committed the crime in the first place and they will have to keep this rule provision in mind when drafting or making a proposal with regard to any fee agreements with the criminal authorities and also with our office. This rule again only comes into play where there is 180-day suspension. We do have felony convictions by attorneys that have resulted in suspensions for periods less than that requiring reinstatement proceedings.

JUSTICE CORRIGAN: Would adopting this rule result in a rule of unintended consequences with suspensions in cases and plea agreements being negotiated in cases which would be under that amount where really for the protection of the public people should be suspended for longer.

MS. BULLINGTON: Well I think that would certainly have a substantial impact on plea practice. I think criminal law practitioners in representing attorney defendants will have to give very careful consideration as to the collateral impact and in point of fact there has been a discussion in our office that because of that collateral impact, should the Court adopt the proposed rule amendment, we believe it fair and appropriate that perhaps our office issue an article for consideration by the Bar Journal warning of those collateral consequences. We believe that there certainly would be some notice that should be given so that appropriate planning may take place and that's in mind with the obligations of our office.

JUSTICE WEAVER: Any further questions? Thank you very much. Item 7. 96-59, Subchapter 9.100. Mr. Falk.

Item 7 96-59 Subch 9.100

MR. FALK: Thank you. Actually I sort of already addressed this

proposal I think. The part I haven't addressed is I think version 2 properly overrules Kelly v Board of Law Examiners. It just seems that when lawyers have been out of the profession for a significant period of time, whatever you've decided that is, 180 days right now is the magic number and they've been out that long and they've committed that serious an impropriety, asking them to get recertified, particularly with respect of their knowledge of the rules of ethics seems to me like a capital idea and I commend it to the Court's attention. Thank you.

JUSTICE WEAVER: Thank you Mr. Falk. Maureen Thomas.

MS. THOMAS: Hello again. I'm again here on behalf of the State Bar Board of Commissioners. We are in fact in support of this particular rule.

JUSTICE YOUNG: Can you tell me how you came to that position. I don't understand the Bar process because I understood that you didn't really have a personal--

MS. THOMAS: How I was appointed?

JUSTICE YOUNG: No, how the Bar process works?

MS. THOMAS: How I was chosen to come and speak today?

JUSTICE YOUNG: How the Bar got to the position.

JUSTICE WEAVER: No, he just wants to know how your committee came to this position.

MS. THOMAS: Okay, I can tell you how the committee came to the position. I can't speak to how the board of commissioners came to the position.

JUSTICE YOUNG: Well, let me hear how your committee deliberated.

MS. THOMAS: Basically what happened is a copy of the proposed rule comes to the committee. We take input from either Bob Edict or another representative from the grievance administrator's office. We receive some input and some background from John Van Bolt on the Attorney Discipline Board. We examine the rules and we have a discussion. Some of our members are persons who sit on hearing panels. Some of our members are persons who defend attorneys who appear before hearing panels, and as I indicated, others are just attorneys in the practice of law who are obviously impacted by these rules.

JUSTICE YOUNG: And then you make a recommendation.

MS. THOMAS: And then we make a recommendation to the State Bar. We cannot formally speak on a recommendation unless the Board of Commissioners gives us permission to do so. As I indicated, the State Bar is in favor of this. They believe it is an appropriate option to be given to hearing panels. Unfortunately there are some actions that when taken by attorneys should in fact result in their permanently losing the privilege to practice law. We prefer version 2 over version 1. The terminology in the rule is somewhat misleading. We think the general public, and in fact many attorneys would be very surprised to know that revocation or disbarment is not in fact permanent. That in fact after five years you can potentially petition for reinstatement. The reason we prefer version 2 is because it clears up a little bit of that misunderstanding in the rule. You have revocation or disbarment and it's permanent. You have suspension and it can be for a varying amount of time. Minimum 30 days. More than 179 days, and then there are consequences if it goes beyond three years in terms of your having to sit for the bar again. We think it's important to let attorneys know up front when they are being disciplined if it is going to be a permanent disbarment. Or if there is going to be a suspension what at least the minimum length of that suspension is. We think it's important for the victims of the actions of the attorneys to understand at that time when they are making their address what the intention is. Is it a permanent disbarment or is it a minimum suspension. In addition, version 2 does have an out for those persons who are concerned that we might make a terrible mistake in permanently disbarring someone. There is an opportunity for the attorney to petition this Court for leave if there was some unusual circumstance. They would petition the Court for leave to file a petition for reinstatement. And for all of those reasons we are in favor of permanent disbarment and in favor of version 2 over version 1.

JUSTICE WEAVER: Any questions of Ms. Thomas?

MS. THOMAS: If you would allow me a personal privilege, as a graduate of Eastern Michigan University during Justice Brickley's tenure, I would like to say thank you very much for your service on this Court, your prior service before being on the Court and I wish you Godspeed in your retirement.

JUSTICE BRICKLEY: Thank you Ms. Thomas.

JUSTICE WEAVER: Okay, anything further on item 7? Item 8. 99-16 Discovery in Misdemeanor cases. And we'll start with Brian Mackie.

Item 8 99-16 Discovery in Misdemeanor cases

MR. MACKIE: Chief Justice, Justices, thank you for hearing from the

Prosecuting Attorneys Association. I am here as president representing the Association's position. I can also speak to appointment on criminal cases while I'm up here, whatever you prefer. Very simply there is no need to extend the court rule on discovery to misdemeanor cases. We have functioned quite well. I think the district judges would agree. They handle matters of fairness. Discovery is given very freely by I believe all prosecutors in all misdemeanor cases.

JUSTICE YOUNG: Apparently Judge Smolenski is unaware. She got up and according to my notes said their association has no opposition to this proposal.

MR. MACKIE: I didn't mean their association, I just mean individual judges. I am not aware of problems on discovery with misdemeanor cases. Of course it comes up in individual cases. Having a court rule gives I suppose more ammunition for those who want to be argumentative on a given case. Most practitioners who defend people accused of crimes I think are very satisfied with the felony rule of discovery. I think they are also quite comfortable with how discovery is handled in the misdemeanor cases. It's a question of volume also. In our county we will have 2,500 felony cases but 8,000-10,000 misdemeanor cases, many of which can be resolved at our arraignments before the discovery process can even be completed. When discovery can be prepared for defense counsel and never even be picked up because the case can be resolved. If there is a particular misdemeanor case where there is a problem, it can be brought to the judge and it will be resolved.

JUSTICE TAYLOR: Mr. Mackie, are you speaking of your experience in Washtenaw County or is this representation for a more broad geographic area. I don't mean this quite the way it sounds but what do you know about Osceola County and how its going on there or a county in the Upper Peninsula. Have you looked into that?

MR. MACKIE: As an association yes. I can't speak to Osceola County. I can speak to Marquette County because I've spoken with the prosecutor about their experience and I think it's the same as Washtenaw. My experience in criminal--

JUSTICE TAYLOR: You're saying this is a cure for which there is no disease.

MR. MACKIE: Correct.

JUSTICE YOUNG: And this is the Association's position.

MR. MACKIE: That is correct.

JUSTICE CORRIGAN: Mr. Mackie, didn't you send us a letter earlier

this year from PAAM saying that the Court ought to take some action to extend reciprocal discovery to misdemeanor cases.

MR. MACKIE: Yes, we had that discussion and we talked about it further and those in the Association on the Board who participated in the discussion said well, since we don't give reciprocal discovery on felony cases, why bother extending the rule to misdemeanor cases. But that is a different problem. But it was basically a feeling that this is creating more trouble than it's really worth.

JUSTICE YOUNG: Have you communicated that to the District Judges Association.

MR. MACKIE: I have communicated that to our judges in Washtenaw County only.

JUSTICE YOUNG: Again, I would encourage you, the District Judges Association wants additional time to consider these proposals. It might be proficious for you to share your association's views that that association.

JUSTICE WEAVER: They're meeting this afternoon.

MR. MACKIE: It's always a pleasure to share with judges at every level.

JUSTICE CORRIGAN: And where does the Wayne County Prosecutor's Office and I suppose we'll hear from Mr. Baughman in Oakland County which protested what this Court did in our order which essentially vacated the ruling of People v Sheldon. Are they in the program. Is Prosecutor Gorsica in the program now?

MR. MACKIE: I don't speak for Wayne County, I'm sure Mr. Baughman will cover that issue. My experience in Wayne County dates back to 1973 when I started practicing at a free legal aid clinic and discovery in 1973 in (inaudible) and Wayne County was absolutely open basically. Here's the file, get what you need. And we functioned pretty well like that. I think functioned in Wayne County just as they do in Washtenaw, which is very well.

JUSTICE WEAVER: Okay. Any further questions? Thank you Mr. Mackie. I see you're going to be on later. Mr. Baughman, Timothy Baughman.

MR. BAUGHMAN: Good afternoon, thank you. As may be apparent from my letter it appears that we do have a somewhat different position among the prosecutors here. To me the beauty of the discovery rule that is applicable in felony cases is that it is triggered by a request. It's self-executing. You don't have to get the

court involved unless somebody is recalcitrant or you need some special discovery beyond the rule which is fairly rare in felony cases. It works I think very well in felony cases and it has reciprocal discovery. Prosecutors get discovery which was from our point of view another part of the beauty of that rule. It codified what the Constitution permits. We can get reciprocal discovery within the Fifth Amendment limits. I don't see any reason why that shouldn't also apply to misdemeanors and the problems of volume and we can dispose of a lot of the cases early on it seems to me are taken care of by the fact that it is a request triggering mechanism. If nobody makes the request there is no need to pass material and in many cases probably it is, I've got one police report, I've got nothing. I've got the security guard's statement, I don't have anything. And there wouldn't be much of a burden. Where prosecutors were concerned that I talked to was with the need for reciprocal discovery in cases where you might have scientific evidence, particular in OUIL's with breathilizer challenges and the like like that, and prosecutors again that I talked to were concerned that the change meant, and district judges were saying hey given this change you don't get any reciprocal discovery even though there is no court rule anymore the defense still gets discovery under our general authority but you don't get any reciprocal discovery and we were concerned about that and didn't see a real problem with simply saying the current rule applies to misdemeanors. I believe unless I'm mistaken the federal discovery rule applies to federal misdemeanors. They don't have a different rule and we didn't see a problem with having the same thing here. Again since it was self-executing and you don't have to trigger it if you don't want to.

JUSTICE WEAVER: Questions? Any other comment on Item 8. Item 9. 99-02 Alternate Dispute Resolution. Terri L. Stangl.

Item 9 99-02 Alternate Dispute Resolution

MS. STANGL: Justice Weaver and Members of the Court, my name is Terri L. Stangl and I'm the director of the Center for Civil Justice which is a non-profit law firm based in Saginaw and representing low-income clients in 10 different counties. The first 13 years of my legal practice were with Legal Services of Eastern Michigan which also assists indigent clients. During that time not only did we handle cases in the 10 counties but we worked with judges in district and circuit courts to implement materials and procedures to assist pro se litigants in court. I appreciate the opportunity to speak about the ADR rules because I look at it from a very, very practical perspective and the rules that this Court comes up with are going to guide and be the framework in which those of us at the local level, the judges and the attorneys and the litigants are going to work with. There are a couple of perspectives I'd like to bring to the Court's attention. The first is how these rules are going to deal with indigent litigants and by that, for now, I mean those individuals who would be entitled to a fee waiver under MCR 2.002. The proposed rule at 2.410(L)(4) says that if a person is indigent or the court determines that they are unable to pay, then they will be excused basically from ADR services unless the

court finds that free or low-cost services are available. My first recommendation is that this language of this section be clarified. It should be very clear that an indigent person who a judge has found cannot pay filing fees should pay nothing in order to get ADR services. If the court finds that someone is not able to pay the full ride but is not entitled to a fee waiver, then it should be low-cost. I believe that is the intent of the rule but it would be helpful to clarify those two different groups as to how that rule would be applied. And I would also ask that this kind of provision that addresses indigent clients be incorporated into the case evaluation rule and the domestic relations mediation rule and the probate rule. There is no comparable provision in those rules and the overall ADR rule sometimes just references that second rule and again I believe it's the intent that this would apply to all procedures but that would help clarify that. Finally I would recommend that it would be clear that these alternative services, whether they be free or low-cost should be under the same standards as other kinds of ADR. The providers should be similarly qualified and have training. Because the way to provide it at free or low-cost, great, but they should be held to the same standards to make sure that the procedures have integrity. The second item I would like to bring to the Court's attention is how important it's going to be at the local level to assure that indigent people and also unrepresented litigants get complete information at key points in their case. This is very true for people who might qualify for fee waivers. Low-income people who are plaintiffs file a fee waiver to get into court. They're covered. But many indigent litigants are civil defendants. They may not know how a fee waiver could affect them. That that could take them out of the process and they wouldn't be obligated to pay fees unless there is a way for them to know. There are a couple of ways in which this could be done. The court rule already talks about that there should be information about the different ADR procedures. It could be included there early in the case. It could also be in any order pertaining to ADR that goes before the conference that a judge is supposed to have with the litigants about whether ADR is appropriate. If it comes up at that point then someone who is indigent or who perhaps is exempt because of domestic violence or other circumstances, that they are informed how I can get out of this, what are the rules on this, and can speak up accordingly. The next to the last area is unrepresented litigants. A growing number of litigants in court are unrepresented. And in some cases from a legal services perspective we are coming up with procedures to help people who cannot access counsel go in for simple court proceedings. Many of these unrepresented people may be able to benefit from ADR but I have some concerns because of some of the procedures there that they may not be able to follow some of the technical procedures. For example in the domestic relations area, in order to opt out you have to do a motion and a notice of hearing and get it scheduled. This can be fairly burdensome to a person who is simply trying to get through a divorce procedure. Similarly in the case evaluation process, the rules show that that is contemplated to be handled by attorneys in front of attorneys. That really is not a good forum for an unrepresented person to do a mediation summary and do a presentation unless they really understand what they are committing to do. My recommendation in this area at least for the short term is that there should be

kind of opt out provisions that claims between parties where at least one is unrepresented should be generally outside of the ADR process unless the litigants are informed about their options, informed about opting out, and make an informed choice that yes, I want to go forward and use this. I think this will help. We may be able to go further from that in the future but in these early implementation stages I really think that would help the courts who are implementing it, as well as the parties to really know what process is there for them.

JUSTICE WEAVER: Do you have these concerns and recommendations written down?

MS. STANGL: Yes. I gave them to Mr. Davis this morning. Okay so we do have access to them. Last on terms of the factors that ADR providers are required to consider, in 2.410(G) there are several different factors they are supposed to look at and we would recommend that one of those factors be the hours of work of the litigant because low wage workers are often in jobs that don't have leave time, don't have flexible schedules, and it may endanger their entry level job to spend several hours going to a mediation hearing or an ADR hearing. I would suspect many ADR providers are willing to do that and it would be nice to have that in the list of factors that they would look at at the time they scheduled their hearing. I appreciate this opportunity and would be happy to take any questions.

JUSTICE WEAVER: Any questions? Thank you very much then. Scott S. Brinkmeyer.

MR. BRINKMEYER: Madam Chief Justice, Justices of the Court, I'm here today as an elected commissioner, a member of the State Bar Board of Commissioners, a member of the State Bar Rules Committee and I speak to you on behalf of the State Bar Board of Commissioners with respect to one item of the proposal of the Supreme Court Task Force. You will hear shortly from another member of the Bar on the issue of the access to justice portions of our position. I will speak only to the question of the proposal regarding expanding the qualifications of mediators and ADR providers to non-lawyers. You should understand historically that this came to the attention of the Board of Commissioners through the Rules Committee that is chaired by (?) Deal. Ms. Deal reported at our July meeting that the committee had met and considered this proposal and recommended that the Board oppose these expansion of these requirements to non-lawyers. The Board then moved and unanimously approved a motion to that effect. The Board wants you to know that this position is not merely a positional stance in support of lawyer job opportunities. As laudable as many of us might feel that is, it is much more important than that. We feel that the education, training and experience acquired by lawyers through the active practice of their profession uniquely qualifies them to deal in assisting litigants in the process of

attempting to resolve their claims without resort to the trial courts. The Court should also understand that the Board's position in opposition to non-lawyer mediators and other ADR providers would not change the current court rule reaffirmed by a proposal of the task force which allows stipulating parties to utilize alternative ADR methods. That's currently in the Michigan court rules; that remains in 2.404.

JUSTICE TAYLOR: Mr. Brinkmeyer, would the theory be that we're protecting the litigants from themselves.

MR. BRINKMEYER: I don't know that that would be the theory, Your Honor. I would prefer to believe that you are (1) by the education, training and experience of the lawyers and (2) by the next prong of what I feel supports this opposition of the board, and that is the discipline system that is already in place. You are protecting the integrity of the process itself and assuring the quality.

JUSTICE TAYLOR: But again, if two litigants choose to have somebody that you and I would think was unqualified resolve a dispute, I mean like the church session let us say or whoever, why do we want to stand in the way of that.

MR. BRINKMEYER: We really don't. That can happen now. The parties must merely stipulate to that. The current court rule allows it but both parties must come in and agree to that process. Alternatively--

JUSTICE TAYLOR: You object though when you don't have mutual agreement on it.

MR. BRINKMEYER: Correct. And our position is that these are court rules for application in a system involving litigants. And whatever process you employ, and now there are seven or eight processes described in the proposal which we support, we feel that if these are litigants who are coming to the table to try and resolve their differences, that the unique status of an attorney through his or her training and his licensure, his obligation to conform to the Code of Conduct and to the ethics responsibilities imposed upon attorneys in this state better prepares them to guide those litigants in the litigation process.

JUSTICE TAYLOR: I think we understand that point. Has there been a bad experience somewhere with this.

MR. BRINKMEYER: Actually it was brought to our attention through a member of the rules committee that requirements similar to the minimum requirements that are being employed in certain areas of the state now are deemed at least in certain opinions to be insufficient. If you look at the requirements alternative to a J.D. degree

for example--

JUSTICE TAYLOR: I'm asking a much simpler question than that. Is there someplace in the country that this has been tried and has found to be sorely deficient.

MR. BRINKMEYER: I'm not aware of another place in the country where it has been tried and been found to be deficient.

JUSTICE TAYLOR: There's no history then of allowing non-lawyer mediators in circumstances like this.

MR. BRINKMEYER: Well today there are non-lawyer mediators who operate in the public arena outside the court system.

JUSTICE YOUNG: Is there any anecdotal data or data that suggests that those systems are less than satisfactory because they are not populated by lawyers.

MR. BRINKMEYER: None has been brought to our attention from any source one way or the other.

JUSTICE YOUNG: What is the empirical basis then for the Bar's position that only lawyers can perform these tasks.

MR. BRINKMEYER: I don't know that I would state it in that way.

JUSTICE YOUNG: All right or that only lawyers should perform these tasks in a court-annexed system of ADR.

MR. BRINKMEYER: I would submit to the Court that we bring to the table the combined experience of many lawyers of many years handling mediation cases. I for myself will have practiced 25 years at the end of this year. I've personally probably handled 200 mediation cases as mediator or as a representative of litigants. In all of those cases that I have handled, lawyers have operated, and I can say even in the most perfunctory of mediation situations, we still have had what I have deemed to be a preferable situation for the litigants. And in the better of those in most cases we have had extremely well-qualified mediators or facilitators operating and all of those have had law degrees and many of those (inaudible).

JUSTICE TAYLOR: Can you give me an example, what is the thing we're trying to make sure never happens to somebody. I just can't quite figure it out.

MR. BRINKMEYER: Let me give one example if I may. We all know that we as lawyers are subject to a code of professional responsibility and to our ethical obligations. We have a disciplinary system to which we must answer and which is already in place as a formalized process for assuring that we do our job. If you spread this out to the public, they are not bound by those same professional obligations, those same ethical obligations.

JUSTICE TAYLOR: So you're worried about the mediator introducing fraudulent testimony or evidence or something.

MR. BRINKMEYER: Could be that. I suppose we could conjure up a number of different types of situations. How would it be handled. The process is somewhat, is starting to be defined by the task force in the proposal but there are certain provisions on eligibility requirements of alternative ADR providers which are not spelled out at all, for example, and to whom do they answer.

JUSTICE TAYLOR: Who do you go to, to me there is and I don't mean there wouldn't be, but if for example you had some sort of disciplinary violation, disciplinary violation by a non-lawyer, wouldn't that be grounds for setting aside the arbitration.

MR. BRINKMEYER: Could very well be.

JUSTICE TAYLOR: So wouldn't that be an incentive to not do that.

MR. BRINKMEYER: It would but I don't know how much, I can only surmise from the minimal requirements that are laid out, a non-lawyer mediator or facilitator is going to appreciate about not only the entire system--

JUSTICE TAYLOR: I just want to clarify one other thing, sir. You say there is--no one else in the country has ever tried this, this is new, new, new. Or you just don't know.

MR. BRINKMEYER: I have had no material brought to me, nor am I aware of any brought to the Board that gives us a history--

JUSTICE TAYLOR: Has anybody done an affirmative step of trying to look into this, like contacting the American Arbitration Association and finding out if they know of any state that is doing this.

MR. BRINKMEYER: To my knowledge I do not know of anyone who tried to do that.

JUSTICE TAYLOR: Might that not be a good idea.

MR. BRINKMEYER: I think it would. I don't know if the task force did that in the course of putting this together. I was unaware of it. I read their report. They appeared and a representative spoke to us at the American (inaudible) of Court here in Grand Rapids. I was unaware of anything that came out in that discussion of their having looked into that history and none was brought to us in the course of our review of this proposal. Let me just say we believe that the Board position is entirely consistent with the goals espoused by the task force in assuring the integrity of the ADR process and in protecting those in the community who come to us and for which we provide these services. Unless there are further questions I thank you for the opportunity to speak with you today.

JUSTICE WEAVER: Thank you Mr. Brinkmeyer. Jeanne M. McGuire.

MS. MCGUIRE: Good afternoon Justices. I am Jeanne McGuire and I am the executive director of a small civil legal aid program in Battle Creek, Michigan. I am also a member of the State Bar of Michigan's Access to Justice Task Force and have been a member for several years now. I'm here today to speak on behalf of the State Bar to address the concerns that the task force has concerning the proposed changes to the court rules regarding--

JUSTICE YOUNG: Excuse me, are you speaking for the Bar?

MS. MCGUIRE: Yes.

JUSTICE YOUNG: Wasn't Mr. Brinkmeyer speaking for the Bar as well?

MS. MCGUIRE: Yes

JUSTICE YOUNG: It has more than one head.

JUSTICE WEAVER: Are you taking different positions?

MS. MCGUIRE: No. I'm not taking a different position. I'm here to address the concerns that the Bar had regarding the alternative dispute resolutions provisions in specific areas of those rules. As many of you know, the State Bar has been a national leader in addressing and resolving aspects of our justice system which have great impact on the poor. For their work the State Bar was awarded the ABA Harrison Treat Award only last year. The Bar through its Access to Justice Task Force has examined

various aspects of our justice system which may impede meaningful access to that system. One such examination has specifically looked at alternative dispute resolution and its an area that we have focused on for quite a few years now. So when the Supreme Court Task Force on Alternative Dispute Resolution came out with their report and the proposed rules we eagerly read those rules and had conversations with people who are involved in that task force to discuss where we thought there might be a negative impact on poor persons. The Bar supports the efforts of alternative dispute resolution. We believe that it is imperative that if we are going to support alternative dispute resolution that we need to develop a system that is functional, is fair and is marked by integrity. It must be a system for everyone, all of us, which includes the poor, the disabled, victims of violence and pro se litigants. We cannot set up a system of secondary justice. The Bar has previously submitted to you written comments on this subject. The comments all emanated from the Access to Justice Task Force and were approved by the full board of commissioners.

JUSTICE TAYLOR: Ma'am are you in favor of what Mr. Brinkmeyer is in favor of, that is, only the poor shall be represented by licensed lawyers.

MS. MCGUIRE: I'm not prepared to speak to that position.

JUSTICE YOUNG: What are you speaking to.

MS. MCGUIRE: I'm going to hit four issues that were brought out in the attachments that I had submitted.

JUSTICE TAYLOR: (inaudible) background, though, might it not be helpful to the poor to have less expensive representatives at an arbitration than an attorney might be.

MS. MCGUIRE: It might be helpful, it might be helpful to have pro bono attorneys.

JUSTICE TAYLOR: But assuming that was not possible, that the poor person wished to have a very capable non-lawyer, let us say, represent them, do you feel we should foreclose them from that?

MS. MCGUIRE: I think that the Bar has spoken on this issue, and I'm not going to, as a member of the Bar, take a position that's contrary to that. Inasmuch as licensed lawyers have the training, have the discipline, have in place a monitoring system, I am very much in favor of that. I would not want a system of mediators or arbitrators that went around and you couldn't grieve and you had no real process to address a situation that might arise. In any kind of an arbitration system that is set up I think that it

is imperative that this Court understand that we have to make sure that these are trained persons, that these are persons who are monitored and that there is some kind of oversight committee as was briefly mentioned in the task force report that there should be an oversight committee. We would like the Court to pay attention to four specific issues that we have found as a task force while reviewing the proposed rules. The first issue for us, as was mentioned by Ms. Stangl is that the cost of alternative dispute resolution will be and is a barrier to low-income persons. The proposed rules now have no mechanism for those who cannot afford to pay for the services. Fee waivers aren't even discussed. The Bar proposes--

JUSTICE WEAVER: Have you presented this in writing to us?

MS. MCGUIRE: Yes, I did. The Bar proposes various solutions in our comments to you. We included discussion of fee waivers, mandatory pro bono work for mediators, court paid services, sliding scales and other means that would enable poor persons to have the same access as everyone else to the services of an ADR provider. Secondly, the Bar is very concerned about the use of alternative dispute resolution method in situations which may not be appropriate. Domestic violence is a very clear example where mediation won't work because mediation requires efforts by the parties to reach an agreement and a party who has used or threatened to use violence or intimidation to compel the actions of another party and the survivor of that violence who may be incapable of discerning their own best interests as a result of the violence are not appropriate parties to reach fair agreements in such a situation. There are many other instances of power abuse, power imbalance, and we would request that this Court recognize that and send a message down to the rest of the judges throughout this state that judges must take steps to rectify that, whether that be through denying arbitration in certain circumstances, through encouraging the use of legal counsel to those parties who are unrepresented, and by clearly stating the procedure to be used to request an exemption from ADR. The third issue that we brought up in our written comments dealt with pro se litigants. Our trial courts are filled with pro se litigants. This is especially true in the family law courts. In these situations usually one party has an attorney and the other party does not. The proposed rule as it stands now puts a lot of burden on the parties. It tells them, for example, that they must decide who their mediator will be. They must decide the type of mediation that they want. Many other burdens are put on them that an unsophisticated legal consumer is just not going to be capable of making. If mandatory ADR is used, we have to come up with a system that supports pro se litigants through efforts that we have discussed and which were discussed in the report that I submitted to you, whether it's through education, whether it's through the ability to consult with some counsel, whatever it is. But to put the pro se litigant on an even stand. My fourth and final remark goes back to what Scott Brinkmeyer said and what I earlier eluded to, that any ADR process which does not mandate trained, competent experienced mediators will not succeed. Likewise any process which does not provide for monitoring of those

mediators and a grievance procedure for disgruntled users of the system will fail. We will not have the confidence of the public and our attempts to promote alternative methods of resolving disputes will go nowhere because there will be no confidence in the system. The State Bar of Michigan requests that these issues be considered when developing the final rules on alternative dispute resolution. Thanks. Are there any questions?

JUSTICE WEAVER: Thank you very much. Ann Smiley. Amy J. Glass.

MS. GLASS: Good afternoon. Thank you. My name is Amy Glass and I'm here first of all on behalf of the ADR section, the alternative dispute resolution section of the State Bar. I would like to clarify also, I suppose in view of deference to Article 9 and also the time frame that finds you all here without your lunch listening to me, I'd like to keep my comments brief and reduce the redundancies to the extent that I can but also to identify the perspective that I bring to my comments and also to be very clear when it's appropriate to let you know some of the comments may go beyond what the ADR section clearly made decisions about because we simply have not talked about every single aspect or answered every question you may have and so in those instances I certainly will be clear about which hat I'm wearing. As I stand before you I bring I suppose a somewhat unique, although happily less unique perspective than most do. I have been in the field of ADR for over 10 years, in a prior life was a litigator for about 10 years, some of those years overlap. I'm about to become the chair of the ADR section for the State Bar, have had some involvement in developing community based mediation programs under the statute which allows counties to develop local community dispute resolution programs and I also am a program planner and a full time neutral. I wear many hats and I'm going to try to be clear to you which hat or which hats I'm wearing when I respond to your questions if you have any. But specifically I would like to first of all reiterate on behalf of the counsel and the section of alternative dispute resolution that the proposed rules and amendments that you have before you, we have supported and we have taken up and I would like to give you some background on peoples' thinking when they voted yes in favor of adopting or recommending the adoption of these proposals. First of all, a bit of context. These proposals come after many years of development, sort of behind the scenes, of ADR. An ad hoc world is what we've come to describe it as, meaning that parties, members of the public, lawyers, have been utilizing alternative dispute resolution methods without the courts' involvement for some time. I think that's a good development. We are now seeing, however, an interest in the public in lawyers and also in members of the bench, of making ADR processes more accessible, more available to the public and to the courts and to the lawyers of our state and that is in part what drives I think the appointment of the task force. I don't want to speak for you, it's your appointment. However, I think it is helpful to look at the overall context within which the Supreme Court Alternative Dispute Resolution Task Force of which I was a

member was appointed. So that context I think is important. Also, I think it raises perhaps the question of whether or not do we really need a rule to do what might be happening naturally within our state. The ADR section counsel and the section as a whole believes that we do need such a rule and what is advanced by that rule, well for one thing we make it accessible and available to more people more quickly. Through education, in the fact that litigants must, under the court rule if it's adopted, be introduced to processes which they have before this time perhaps only glanced over. In order for this to work, of course, we need informed judges and court administrators and court personnel. We need more informed lawyers, we need an adequate number of qualified, well-trained neutrals. We need a supportive court infrastructure which in part may mean funding, often does mean funding in order for programs to work.

JUSTICE YOUNG: Does the proposal address any of these concerns?

MS. GLASS: Yes, in the sense that--

JUSTICE YOUNG: Could you talk about the proposal. How much time do you have left.

MS. GLASS: As much time as you tell me I have left, I suppose.

JUSTICE WEAVER: You're probably done. Would you tell us what you support and what you oppose. That would be very helpful.

MS. GLASS: Okay. We support the rule. In saying that I want to be clear that not every member of the section, in fact not every member of the Supreme Court Task Force was in complete agreement on every single aspect of that rule. However, overall the rule does accomplish many goals which the task force and the ADR section would promote and would want to urge this Court to allow including increasing public involvement in the resolution of their own disputes, promoting litigant satisfaction, unclogging dockets and freeing up the backlog and freeing up judicial resources, reducing costs to the parties. And also I would add that in training neutrals who are predominantly but not always in every circumstance going to be lawyers. Depending on how things go with your decisions. Introducing lawyers to the process of mediation or ADR introduces them to new practice behaviors and conduct within dispute resolution systems and that has a positive impact which probably is not easily measured but in my own experience I have seen positive results of people who have gone through mediation training, for example, and come back later to negotiation table prepared to negotiate in a more productive fashion because of that training that they've been exposed to.

JUSTICE WEAVER: Is there anything that your section opposes in the rules?

MS. GLASS: As a section there is nothing specifically that we would oppose, however, if given the liberty to speak to issues about which we debated, I could speak to that.

JUSTICE TAYLOR: How does your section feel about the use of non-lawyers, if one of the parties wishes it.

MS. GLASS: Okay, the section as a group has not specifically come out with a decision about that except to recommend adoption of the rule as it is presently drafted. The discussion behind that, if you're interested, we too are very concerned about having high standards, not lowering standards for indigents or for anyone else, about maintaining standards, maintaining the integrity of the process. Speaking on behalf of myself and this point of view is not unique but I can't represent it as being the council's point of view, I don't believe one needs a law degree to be an effective mediator. If we're talking about a different process such as arbitration where the task of the neutral is to impose a decision which one can infer requires a knowledge of the law and application of the law. I would be much more comfortable with lawyers in that neutral spot. However when we're talking about mediators, my personal view is yes, a lot of training, a law degree and perhaps years and years of legal experience are not enough. In the same instance, much training and years and years of mediation experience even without a law degree might make one a very fine mediator and I would not want to rule out such a person from serving on the panel.

JUSTICE WEAVER: Your section supports the proposal, is that correct?

MS. GLASS: The section's position on that, again, the new information that I received is that the State Bar has issued additional comments and so I would want to be very careful about not holding myself out as representing the State Bar as a whole, but our discussion, the substance of that discussion was not in opposition to the idea of non-lawyers serving on those panels.

JUSTICE WEAVER: Okay, do you have any other points because we need to move on.

MS. GLASS: Okay, I'll make this very brief. Speaking about one other category of facts that the council addressed or took into account when it considered these rules was the process employed by the Supreme Court Dispute Resolution Task Force and the composition of that task force. We understood that that task force was comprised of many different individuals running across the complete spectrum of servance of the legal system in our state, including judges, federal and state, district court judges, court administrators, other court personnel, representatives of the community dispute resolution

programs, scholars from universities, trial lawyers, neutrals, etc. The idea being that all of them had a perspective that would become very important when we tried to craft these rules. That piece of information was taken into account by the council. Also understanding that when you have that many perspectives--

JUSTICE WEAVER: Do you object to that?

MS. GLASS: Not at all, we support that wholeheartedly. But what that means though is that in order to reach consensus on a draft rule that everyone could sign on to, there were compromises made. At the same time the compromises were not simply squeezed out of people but made in an informed environment. For example, using myself as an example. I've long ago gone on record as being a supporter of voluntary mediation programs. And very wary about mandatory ones. I all the time work in a mandatory environment as well as voluntary. That's my personal opinion. Nonetheless I was allowed to listen to individuals who face dockets which are in a crisis mode because of overflowing, more cases than can be handled by the staff, by the court, within the time allotted, and in that crisis mode I understood a perspective articulated that I need some vehicle to introduce more people more quickly to mediation and ADR. A provision which allows me as a court, as a judge, to order the use of mediation or ADR will assist me. What I know from other jurisdictions is that when you don't have a docket problem judges are very reluctant to order parties into mediation if they have expressed a desire not to go there.

JUSTICE CORRIGAN: Ms. Glass, given those problems that there were in the compromise process, wouldn't it be better for our Court, if we were thinking about implementing this, to start with pilots in those jurisdictions that so strongly want it to be mandatory, rather than imposing this on the whole state.

MS. GLASS: Okay, I believe that's a very good question and the model you describe I think is a good model. I don't think it's the only one.

JUSTICE CORRIGAN: Rather than mandate for the entire state of Michigan that this occur. That's all I'm asking you. Are you saying that you have to do it for the whole state of Michigan.

MS. GLASS: We presently have several models, several programs which are now in place where circuit court judges are mandating the use of ADR and mediation specifically. I know that they have loosely been gathering data, I don't know how formal they've been, but what I understood after participating as a member of the task force is that the program planners for those courts are happy and satisfied with the results. As a mediator working within those programs, frankly my own behaviors, the tools of the trade so to speak that I employ in a mandatory setting versus voluntary setting are quite

different because I bear in mind that we're dealing with parties that are there not by their choice.

JUSTICE YOUNG: The question was whether it would be prudent to try it in more pilot projects than to mandate it all through the state. Do you agree with that proposal or not.

MS. GLASS: I would personally, and this is not the council's point of view necessarily, personally I would prefer that model and a more cautious approach than across the board requiring mandatory mediation.

JUSTICE WEAVER: Okay, I think your time is about up.

MS. GLASS: Okay, I thank you for your time and will close now and make myself available if you have any additional questions, I invite you to call. Thank you very much.

JUSTICE WEAVER: Thank you. Michael Coakley. Judge Dennis Kolenda, but I don't see him. Anyone else on the ADR issue. Now 11 and 12 we'll take together. Judge Smolenski has yielded her time and left and we have, we'll take 99-39 and 99-42 and we have Brian Mackie.

Item 11 99-39 Amend MCR 6.610

and

Item 12 99-42 Amend MCR 6.610(D)

MR. MACKIE: Thank you again for your accessibility and your endurance. I'm hoping that in this instance I am in agreement with brother O'Hare in Wayne County.

JUSTICE WEAVER: He's not speaking today (inaudible).

MR. MACKIE: We are simply asking that the court rule conform with the Constitution as the United States Supreme Court has determined in Argersinger v Hamlin and this Court determined last December in Frankenbaugh. No one is opposed to representation. I think all judges, all prosecutors prefer if people are represented. It's a question of resources and is this the best use of resources and we would suggest simply that the court rule conform with the Constitution. Have any questions? Thank you very much.

JUSTICE WEAVER: Any comments on item 11 or 12. Final item, item 13 98-10 repeal of 7.305(B). I have M. Bryan Schneider.

Item 13 98-10 Repeal of 7.305(B)

MR. SCHNEIDER: Thank you Chief Justice Weaver and Members of the Court. By way of introduction, my name is Bryan Schneider. I've only been an attorney about four years now, so rest assured I am not a Philadelphia attorney quite yet. I've been lucky enough to serve as the law clerk to the United States Magistrate Judge Paul Comlin in the Eastern District since I've gotten out of law school. I first became interested in this subject about five years ago when I was in law school. I began a research project on the certification issue which culminated in an article in the Wayne Law Review. I happened to bring seven copies of that article just by coincidence if the Court will be interested in copies of them. I also have brought seven copies of a written statement so I can leave that and I can briefly cover just a couple quick points and get out of here.

JUSTICE CORRIGAN: It will be interesting to know, is your note "But Answer Came There None, the Michigan Supreme Court on Certified Question of State Law", is that your article?

MR. SCHNEIDER: That is correct.

JUSTICE CORRIGAN: I already know about it, but

JUSTICE WEAVER: You can still leave seven copies.

JUSTICE CORRIGAN: We're familiar with what you said there.

MR. SCHNEIDER: Okay, again I don't want to rehash everything in there. I take it the Court's concern is not with certification in general, but whether the Court has the constitutional authority to answer certified questions. I also (inaudible) goes back to Justice Levin's concurring opinion in In re: Certified Question Bankey v Store Communications.

JUSTICE WEAVER: So what's your answer in a word.

MR. SCHNEIDER: In my word, my answer is yes, you have the constitutional authority to do so. I think it clearly falls within the judicial power as defined in Article VI, Section 1.

JUSTICE YOUNG: Which part of that?

MR. SCHNEIDER: Article VI, Section 1, that's the entirety of the judicial power in the Michigan courts.

JUSTICE YOUNG: Which part of that, is it appellate jurisdiction?

MR. SCHNEIDER: Well, that's one of the issues, and Justice Levin in his opinion referenced a Utah Supreme Court case which said that it did not fall within their appellate jurisdiction.

JUSTICE YOUNG: Why would answering a question from a foreign jurisdiction fall within our appellate jurisdiction.

MR. SCHNEIDER: Well I think part of it depends on how broadly or narrowly you want to define appellate jurisdiction. In the narrowest sense appellate jurisdiction is of course reviewing lower court cases. I think it is fair to say the appellate jurisdiction includes those things appellate courts normally do and I think in 1999 appellate courts answer certified questions.

JUSTICE YOUNG: What would be the definition of appellate jurisdiction that you're applying here. Your definition of appellate jurisdiction is as framed by the Ton-Ton (??) convention and as voted on by the voters in 1963 is whatever we decide it is.

MR. SCHNEIDER: Well, no, I think there are certain limits.

JUSTICE YOUNG: Well what would be the limitation.

MR. SCHNEIDER: I think the only easy answer is to say appellate jurisdiction is sort of the narrow historical definition, the power to review decisions of lower courts.

JUSTICE YOUNG: Well how do you get a broader definition.

MR. SCHNEIDER: Article VI, Section 4 also provides in substantial measure original jurisdiction in this Court for a number of things and it allows it to issue various writs. Article VI, Section 5 also provides this Court with rulemaking power. It's not something that--

JUSTICE YOUNG: Can we just by rule then expand our constitutional authority.

MR. SCHNEIDER: Well, I don't think you're expanding the constitutional authority. The constitutional authority is conferred by Article VI, Section 1, it's the judicial power.

JUSTICE TAYLOR: Isn't it the judicial power as understood by people who understood the language in 1963 and voted for this proposal.

MR. SCHNEIDER: Yes, but I think there the judicial power would have included answering certified questions. Even if the certified question itself was not in their minds.

JUSTICE YOUNG: Well, wait a minute, how would you say that when they specifically provided for certification by the Legislature and the Governor and failed to include references to foreign jurisdictions. They understood this notion that the Court might be called upon to make answers to internal state entities so why would we presume that the people who enacted our Constitution in 1963 contemplated this process and moreover authorized this Court to do so.

MR. SCHNEIDER: I think there's really two answers to that. The first is I just don't think certification would have been in their minds one way or the other so --

JUSTICE TAYLOR: See if it's a matter of constitutional, isn't that the end of the question if it isn't in their minds. If they don't understand it to include this power, then we don't have that power.

MR. SCHNEIDER: No, in a sense yes. But the way I would phrase it is because the state constitution is not a grant of power in any sense, I think this Court's cases and U.S. Supreme Court's cases have said the state has the natural governing power reserved for them by the separation from England.

JUSTICE TAYLOR: Right. The federal government delegated it powers I understand that.

MR. SCHNEIDER: So our state constitution is a limit on powers, so I would say if the judicial power has not been specifically limited, I think it comes within the judicial power. The argument that's been--

JUSTICE YOUNG: Was the power of review known in England? The review of certified questions.

MR. SCHNEIDER: Not at the time of 1776, but interestingly something I talk about in my article, in the mid-1800's England did pass a certification act allowing

for certification between different courts within the British Commonwealth.

JUSTICE TAYLOR: Your analysis would make ineffectual the delegations of authority to this Court in the Constitution because you would say the judicial power is so broad that you wouldn't have even had to put those things in unless it might have been then that they had something else in mind by putting them in, that is to say, they did want to limit the jurisdiction of the court.

MR. SCHNEIDER: In a sense, yes. For example, going back to the issue allowing for the Governor and Legislature to certify (inaudible) I think the distinction there is answering a question posed by the Governor is not within the judicial power. That's purely an advisory opinion. You need an affirmative grant.

JUSTICE YOUNG: In what sense is answering a question posed by another and foreign court anything different that (inaudible).

MR. SCHNEIDER: In this sense, and that is exactly what Justice Levin was getting at in his opinion, in two senses. Justice Levin's argument was it's not binding and has no force of law and the Supreme Court can't issue a judgment, therefore it's an advisory opinion. The answer to that is, it is binding. Every federal court of appeals that has considered the question, including the Sixth Circuit, which is presumably where most questions to this Court would come from, has said district courts, when you certify a question you are bound by that answer, you must apply the answer and the case is over. The fact that this Court can enter a judgment that would be executable I don't think goes to the advisory opinion issue, in that sense it's akin to a declaratory judgment. A declaratory judgment action there's really no executable order or enforceable order that's issued. It's just a declaration that the law is invalid, and even the Supreme Court which has severely limited federal court jurisdiction under the case controversy requirement in Nashville Central St. Louis Railway Co v Wallace said that's permissible. We're not stuck with the method of getting the issue to the Court. The question is, is there a case, are the parties going to be bound to it. And I think when answering a certified question it's the same thing. It's a procedural vehicle for bringing otherwise existing case or controversy before the Court.

JUSTICE WEAVER: Do we have any other questions?

JUSTICE CORRIGAN: I would just like to thank Mr. Schneider for his interest in this as a young lawyer. He has made a contribution and thank you for coming today.

JUSTICE TAYLOR: Be sure to leave your law review article.

JUSTICE WEAVER: Leave them with the clerk. We appreciate that very much. Allan Falk.

MR. FALK: Lucky for you it's my last time up here today.

JUSTICE YOUNG: I thought the same thing.

MR. FALK: I'm sure you did. I thought I would just preempt that. It is with somewhat mixed feelings that I favor repealing this proposal because I think the certification process does serve a value but the question is should this Court be aggrandizing its own powers when it so frequently is called on to tell other branches of the state government that they have exceeded theirs. So just in a political sense it's probably a bad idea. If it's a close question you should perhaps err on the side of not straying over the line but I don't think it's that close a question. If you recall I think it was about 1791 that the U.S. Supreme Court answered a request from President Washington for an advisory opinion and he said no our jurisdiction is limited to cases or controversies. And the Michigan Supreme Court historically has understood its jurisdiction in the same way. We have the framers of the '63 Constitution recognized a difficulty and created the advisory opinion process on the request of the Governor or the Legislature of either house and this Court by its own precedent has said well when we issue an advisory opinion that's really not precedent for *stare decisis* purposes. It's just something out there. So that requires specific constitutional sanction to do that because it's recognized that the inherent judicial power doesn't extend to issuing those kinds of opinions.

JUSTICE CORRIGAN: Is there a distinction between an advisory question and a certified question opinion. As Mr. Schneider just made the point, this is going to result in a binding judgment, for example, in federal court.

MR. FALK: Well it's going to be a binding judgment but it's carried out by somebody not under your control.

JUSTICE CORRIGAN: It's still a controversy that results in a binding judgment (inaudible).

MR. FALK: Elsewhere, but your jurisdiction over cases or controversies is those pending in Michigan courts and the power of Article VI, Section 1 says the judicial power of the state. That's the question. Now I will recognize that the Ohio and Oklahoma Supreme Courts have said well just because we're states we have this power because that's one aspect of being a state, we must be able to answer the certified question. I think that's way too glib an analysis. Historically you will recall that this all arises because of federal court jurisdiction in diversity of citizenship cases so Congress

passes a law and says it was ambiguous, let's say, and in Swift v Tyson the U.S. Supreme Court says, I think about 1912, well this means in diversity cases we'll just apply some federal common law and then in 1938 in Erie Railroad v Thompkins the Supreme Court thought better of that and said no, now, we've got to try and operate like state courts. We'll follow our own procedures but other than that in the substantive rules of decision and hopefully the outcome will be the same as they would have been in state court. And all we're doing under the diversity clause is what the original framers of the federal constitution wanted is to make sure that you have a fair adjudication, not a home court advantage for somebody. So 1963, our Constitution is 25 years after Erie Railroad v Thompkins. Surely all the members of the judiciary committee of the Con-Con were aware of this problem and of the availability of certain questions of certification and they didn't put that in the Constitution.

JUSTICE CORRIGAN: But I mean it's rare to have a certified question asked and it seems it's an outgrowth of sensitivity of the federal courts to the federalist concerns isn't it.

MR. FALK: Oh, I have no doubt of that, although if they don't like your answer they can find artful ways to distinguish it and of course I think you're all aware that once say in our case, the Sixth Circuit, comes to a decision on a point of state law that's the end of it. The U.S. Supreme Court isn't going to take a case involving a question of state law. They might take it if it involves some federal constitutional question or some question of interplay with a federal statute but strictly in terms of typical diversity of citizenship cases they're not going to be interested. So what the Sixth Circuit says is going to be final and if they like your answer that's fine. If they don't they'll find probably a way around it. So I don't see how that's going to help much.

JUSTICE WEAVER: Any questions of Mr. Falk. Anything else.

MR. FALK: I would just like to also add my voice to wishing Justice Brickley well. I think it's a shame that you have to retire for health reasons. I'm sure we all wish you could have fulfilled your term. You're the one member of this Court for whom I haven't directly ever worked.

(inaudible)

MR. FALK: I knew there was one of those left out there somewhere.

JUSTICE WEAVER: On behalf of all the Members of the Court I would say that we will indeed miss Justice Brickley. I guess this is the last official time we will be sitting like this and we'll miss you. I assume if there is no further comment on this, we are adjourned.